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No. 83-599

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CAPITAL CITIES MEDIA, INC., t/d/b/a THE WILKES-BARRE TIMES LEADER and NEP COMMUNICATIONS, INC., t/d/b/a WNEP-TV NEWS, THE ASSOCIATED PRESS, THE PENNSYLVANIA ASSOCIATION OF BROADCASTERS, AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,

Petitioners

v.

PATRICK J. TOOLE, JR., Judge of the Court of Common Pleas of Luzerne County,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

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CAPITAL CITIES MEDIA, INC., t/d/b/a THE WILKES-BARRE TIMES LEADER and NEP COMMUNICATIONS, INC., t/d/b/a WNEP-TV NEWS, THE ASSOCIATED PRESS, THE PENNSYLVANIA ASSOCIATION OF BROADCASTERS, AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

To the Chief Justice and Justices of the Supreme Court of the United States:

The Respondent, the Honorable Patrick J. Toole Jr., Judge of the Court of Common Pleas of Luzerne County, Commonwealth of Pennsylvania, respectfully requests that the Petition for Writ of Certiorari be denied, and offers as reasons therefor the following:

COUNTER-STATEMENT OF FACTS

This case began with the murder trial of George E. Banks for the slaying of 13 people, including five of his own children, over which the Honorable Patrick J. Toole Jr., Judge of the Court of Common Pleas of Luzerne County, Pennsylvania, presided[1] (hereinafter referred to as the *Banks* case).

The *Banks* case has received widespread and extensive public attention at the local, state, and national levels from the occurrence of the offense to date.

During the jury-selection process, it became apparent to Judge Toole that the prospective jurors had fears concerning their selection and the disclosure of their identities. Before the completion of jury selection, Judge Toole orally advised each member of the media present at the *voir dire* examination in Allegheny County (a change of *venire* had been granted) that names and addresses of jurors actually selected were not to be printed; nor were any photographs or sketches to be made of such jurors. In effect, at that time, identities of the prospective jurors were a matter of public record; those of the jury were not.

All those members of the media present during the jury-selection process agreed to the restrictions and made no objections to Judge Toole.[2]

On June 3, 1983, several days after the *voir dire* proceedings, Judge Toole memoralized by way of court order pursuant to Pennsylvania Rule of Criminal Procedure 326 (Petitioner's Brief, p.8 n.2) the stipulations between the media members and the court, as follows:

---

1. *Commonwealth v. Banks*, Criminal Nos. 1290, 1506, 1507, 1508, 1519, 1520, 1524, and 1982, Court of Common Pleas of Luzerne County, Commonwealth of Pennsylvania.

2. According to several Petitioners, they were represented by counsel in earlier proceedings in the *Banks* case (Application for Stay, etc., *Capital Cities Media, Inc. v. Toole*, U.S. Supreme Court, October Term 1982, No. A-1070).

> No attempt shall be made by anyone to talk to, record or photograph, televise or videotape any juror or jurors at any time during their service in this case.

(Petitioners' Appendix: 9a-14a):

> No person shall print or announce in any way the names or addresses of any juror.

(Petitioners' Appendix: 9a-14a).

Following the promulgation of the June 3 order pertaining to photographs of jurors, Judge Toole met with members of the News Media Association and, as a result, orally authorized and advised all local media members that they could photograph or televise the jury entering the courthouse on Monday morning, provided the point of view was from the rear so as not to reveal or permit one to ascertain the identity of the subjects.

In addition, Judge Toole, in Allegheny County, permitted sketches of all persons present during the selection, with the exception of prospective or selected jurors.

The Judge also advised all members of the media that courtroom sketches would be permitted of all participants, but that no sketch was to be made of the jurors which could in any way reveal their identity.

This photograph provision applied only "during [the jurors'] service in these proceedings" and since the jury has been discharged, the order is no longer in effect.

Following their discharge, a number of jurors agreed to public interviews and their names were published with their consent in a number of newspapers, and at least one newspaper did publish all the names and addresses without regard to such consent.

The name-and-address provision of the June 3 order was vacated on August 15, 1983 by Judge Toole in an order which stated his opinion that the jurors' rights to privacy and protection had been preserved and that the

passage of specific lengths of time from jury selection and the return of the verdicts rendered their further protection by the court unnecessary (Appendix: 1a).

The June 3 order contained a third provision which was prompted by the fact that at pretrial conference, Judge Toole was advised that there would be over 200 exhibits marked for use at trial. In addition, a few days before issuing the June 3 order, an incident involving an exhibit occurred in another courtroom, resulting in a mistrial during jury deliberations in a murder case. In that case, an exhibit which had not been admitted into trial (it had been admitted in a suppression hearing) made its way in some unknown manner to the jury room along with properly admitted exhibits. The error was observed while the court was responding to a question submitted by the jury during its deliberations. The mistrial and its cause were the subject of a critical editorial by Petitioner *Times Leader*. Said the *Times Leader*: "[T]he entire [court] system had better be fine-tuned to make sure a snafu like this doesn't happen again." (Appendix: 3a). It was to avert another bizarre development like that criticized by the editorial which prompted the order:

> No one, except attorneys of record, their agents, Court, witnesses and jurors may handle exhibits *except by Order of the Court*. [Emphasis supplied]

On July 22, 1983, Petitioners for the first time applied to Judge Toole for access to the trial exhibits, a stay of the exhibit provision having been denied on July 13, 1983 by Mr. Justice Brennan for the reason that Petitioners had not sought a court order permitting access nor identified exhibits to which they sought access (Petitioner's Appendix: 5a). On August 9, 1983, the Petitioners' motion for access was granted and the decision, upon appeal by the defendant, Banks, and the District Attorney, was affirmed. *Commonwealth v. Banks, ex rel.*

Capital Cities Media, Inc., et al., Superior Court of Pennsylvania, Nos. 2195, 2135 Philadelphia 1983.

On or about June 13, 1983, ten days after Judge Toole's order of June 3, several of the Petitioners applied for an extraordinary Writ of Prohibition to the Supreme Court of Pennsylvania, seeking the writ to be directed to Judge Toole prohibiting him from enforcing the three above-mentioned orders pertaining to exhibits, photographs, and names and addresses. Those several Petitioners who were plaintiffs below did not allege that Judge Toole lacked the jurisdiction to enter the June 3 orders, nor did they allege that there was no adequate remedy at law, both prerequisites for a Writ of Prohibition. Instead, they merely alleged the unconstitutionality of the orders.

At no time did Petitioners seek relief from the June 3 orders by way of petition to the trial judge who entered them, Respondent Judge Toole.

In an order filed June 30, 1983, the Supreme Court of Pennsylvania denied without opinion the application for a Writ of Prohibition (Petitioners' Appendix: 8a). It is from this denial that Petitioners seek this Court's Writ of Certiorari to the Supreme Court of Pennsylvania.

REASONS FOR DENYING THE WRIT

1. The matter is moot and there is, therefore, no cognizable case or controversy.

The June 3 order pertaining to photographs expired on its own terms after the jury was discharged, on June 22, 1983. The order pertaining to names and addresses was vacated by the trial judge, on August 15, 1983, and the Petitioners were granted access to trial exhibits under the applicable order by the trial court, on August 9, 1983.

Because none of the orders challenged are presently in effect, the Petitioners argue that there is a cognizable danger of recurrent violations of their rights which will elude review. Had Petitioners pursued their remedies at law outlined in footnote 5 of this brief, they would have had an opportunity to obtain a timely stay and state appellate review of the June 3 orders.

Several of the Petitioners knew days in advance of Judge Toole's intent to enter his closure orders and they had retained counsel at an even earlier time. They did nothing save agree to the restrictions as to photographs and names and addresses. It was not until ten days after the order of June 3 issued that several Petitioners applied for a Writ of Prohibition. And it was not until July 22 that Petitioners requested trial exhibits after Mr. Justice Brennan had ruled that a challenge to that order was not ripe until such time that a request was made and denied (Petitioners' Appendix: 5a).

That Petitioners sought but did not obtain a Writ of Prohibition is not evidence that the matter evades review, but only perhaps that Petitioners took a wrong road. When the writ was denied them on June 30, they still had three days to but did not file their notice of appeal. *See* Pennsylvania Rules of Appellate Procedure 903; 1311.

It is not an uncommon practice for attorneys to seek an immediate stay of an interlocutory court order pend-

ing its appeal when the effect of that order is to grant an injunction or when the effect is to change immutably the position of the party aggrieved. Pennsylvania has provided for these circumstances. Petitioners present this Court with what could perhaps best be described as a bootstrap argument based on their choice of timing and procedure.

Petitioners claim that Judge Toole's orders are capable of repetition because state defendant Banks has a pending appeal and may obtain a new trial. This argument, being tied as it is to Bank's success or failure, makes clear that such as the challenged orders are not routine in Pennsylvania, nor regularly issued by Judge Toole.

This case is noticeably distinguishable from *Globe Newspapers Co. v. Superior Court*, ____ U.S. ____, 102 S.Ct. 2613 (June 23, 1982), and *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976). In *Globe Newspapers*, it was not simply a closure order under attack, but also a statute requiring such orders in certain cases. Since it could reasonably be assumed that the petitioning newspaper would someday be subjected to another order relying on the mandatory rule, this Honorable Court held that the controversy was not moot. *Id.* In the instant case, however, Petitioners have not attacked the validity of Rules 326 and 1111 of the Pennsylvania Rules of Criminal Procedure pursuant to which Judge Toole issued the orders in question. It is nothing short of remote that Petitioners will one day be subjected to a similar order by either Judge Toole or another Commonwealth judge in a case involving virtually identical facts and circumstances.

In addition, the case *sub judice* is equally distinguishable from *Nebraska Press Assn., supra.* In *Nebraska Press*, petitioners had brought an action against not only the judge who had issued a closure order, but against the State of Nebraska as well. Under review in that case was a decision on the merits by the Nebraska

Supreme Court authorizing state prosecutors to seek restrictive orders in appropriate cases.

In the instant matter, Petitioners have sought relief only against a single trial judge of the Court of Common Pleas of Luzerne County in an isolated and unusual case. Moreover, Petitioners have not claimed — and, indeed, could not claim — that either the Commonwealth of Pennsylvania or the Pennsylvania Supreme Court has as yet stamped its imprimatur on the challenged closure orders or their manner of issuance.

2. This Honorable Court is presently without sufficient information to decide the matter of its jurisdiction over this case because the decision of the Supreme Court of Pennsylvania to deny the extraordinary supervisory remedy of a Writ of Prohibition may well have rested on adequate and independent state grounds.

This Court will not assume that there are no adequate and independent state grounds when there is no state-court opinion and where it does not fairly appear that the state court rested its decision primarily on federal law. *Michigan v. Long*, ____ U.S. ____, 51 U.S. Law Week 5231, decided July 6, 1983. The lack of an opinion in this matter dictates that the matter be remanded for clarification. *See Philadelphia Newspapers, Inc. v. Jerome*, 434 U.S. 241 (1971) (Rehnquist, J., dissenting).[3] The presumption[4] created by this Court in *Michigan v. Long, supra*, has, as a condition precedent to its

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3. *On remand* 387 A.2d 425, 478 Pa. 484 (1978), *appeal dismissed* 443 U.S. 913.

4. "[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, *and* when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so [emphasis supplied]." *Michigan v. Long*, ____ U.S. ____, 51 U.S. Law Week at 5234.

existence, a state court opinion. Even were it to be argued that the very lack of an opinion raises the *Michigan* presumption, such an argument must fail in this case for several reasons.

Firstly, Petitioners requested that a Writ of Certiorari be directed to the Supreme Court of Pennsylvania to review that tribunal's denial of an extraordinary Writ of Prohibition. It cannot be said that a mere denial of a Writ of Prohibition without opinion of necessity implicates federal law as the source of decisive authority.

"A Writ of Prohibition is not a proceeding between private litigants, but rather it is a vehicle by which a superior tribunal may restrain an inferior tribunal, over which it has superintendance, from exceeding its desegregated [sic] jurisdiction [citations omitted]." *Petition of Dwyer*, 406 A.2d 1355, 1363, 486 Pa. 585, 600 (1979). If the inferior tribunal has the jurisdiction to hear and decide the matter, then a Writ of Prohibition will not be granted for the correction of asserted error or abuse of discretion. *Interstate Commerce Commission v. New York New Haven & Hartford Railroad Co.*, 287 U.S. 178 (1932). It will not issue when there is another adequate and alternative remedy, either on appeal of the final judgment or by permissive interlocutory appeal through the appellate rules.[5] The writs may not be used as a substitute for the authorized appeal. *U.S. Alkali Export Assn. v. U.S.*, 325 U.S. 196, 203 (1945).

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5. Petitioners could have but did not pursue state appellate review of the June 3 orders at law under Pennsylvania Rule of Appellate Procedure ("Pa. R.A.P.") 311 (a) (4) (Interlocutory Appeals as of Right—Injunctions) or under Pa.R.A.P. Chapter 13 (Interlocutory Appeals by Permission). Petitioners could have, at the same time, but did not seek to obtain a stay of the trial court's orders under Pa.R.A.P. 1732 (Application for Stay or Injunction Pending Appeal). With respect to an expedited transmission of the record, Petitioners had but did not avail themselves of the benefits of Pa.R.A.P. 1923 (Statement in the Absence of Transcript) and Pa.R.A.P. 1924 (Agreed Statement of Record).

Secondly, as this Honorable Court observed in *Philadelphia Newspapers, Inc. v. Jerome*, 434 U.S. at 244, the U.S. Supreme Court regularly denies applications for extraordinary relief without typically expressing its opinion for doing so. As Justice Rehnquist observed in his dissent in *Philadelphia Newspapers, Inc. v. Jerome*, 434 U.S. at 243, there is no reason to presume that the petition for a Writ of Prohibition was rejected because the Pennsylvania Supreme Court disagreed with the Petitioners' constitutional claims.

Thirdly, the Pennsylvania Supreme Court denied the Petitioners' application for a Writ of Prohibition on June 30, 1983 (Appendix: 2a). This Court decided *Michigan v. Long* on July 6, 1983. The Commonwealth of Pennsylvania therefore had no notice that an opinion containing a plain statement that the state supreme court's opinion rested on adequate and independent state grounds was required by this Court in its determination of its own jurisdiction. Nor was the state supreme court compelled to make such a plain statement by the knowledge that Petitioners would seek a Writ of Certiorari.

As was said by this Court in *Michigan v. Long, supra*, the approach (that of taking jurisdiction in the absence of a plain statement that the decision below rested on state grounds) obviates *in most instances* the need to examine state law or the need for clarification by state courts of their decisions. This Court was quick to note, however, that there may be certain circumstances in which clarification is necessary or desirable and that it would not be foreclosed (by the *Michigan* decision) from taking appropriate action. *Id. at* ___ U.S. ___, 51 U.S. Law Week at 5234 n.6

This case is an example of such a case, where clarification by the state court is both necessary *and* desirable. It cannot be overemphasized that Petitioners seek the reversal of the denial of a Writ of Prohibition, a remedy which requires the court granting it to depart from

its normal appellate function. In Pennsylvania, there must be a showing of extreme necessity, *Pirillo v. Takiff*, 341 A.2d 896, 462 Pa. 511 (1975), *appeal dismissed, cert. denied* 423 U.S. 1083. The writ is to be used with great care and forbearance. *In Re Investigation of January 1974 Philadelphia County Grand Jury*, 328 A.2d 485, 458 Pa. 586 (1974). *The purpose of the writ is not to pass on the rights of litigants, but to manage and control inferior courts to prevent them from usurping jurisdictions and powers which they do not constitutionally and legally possess. Carpentertown Coal & Coke Co. v. Laird*, 61 A.2d 426, 360 Pa. 94 (1948). Moreover, *prohibition is*, in Pennsylvania, *a legal and not an equitable remedy. Borough of Akron v. Penna. Public Utility Commission*, 310 A.2d 271, 453 Pa. 554 (1973).

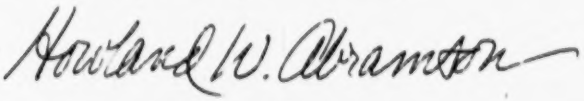
It would be inappropriate for this Court to presume that the Supreme Court of Pennsylvania passed upon the rights of the litigants using federal law merely because there is no opinion when such a presumption is clearly rebutted by a plain statement by the state supreme court that the purpose of the Writ of Prohibition is *not* to pass on the rights of the litigants. It would be equally inappropriate for this Court to entertain such a presumption in an area involving the supervision by the state supreme court over its trial courts, a matter totally unrelated to federal law.

Given these circumstances, it cannot be said that the state supreme court's action may be reasonably explained by requirements of federal law.

CONCLUSION

There being no case or controversy, the Respondent submits that this Honorable Court lacks subject-matter jurisdiction over this case.

Respectfully submitted,



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APPENDIX

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS of LUZERNE COUNTY * CRIMINAL
v.	:	
GEORGE E. BANKS	:	Nos. 1290, 1506, 1507, 1508, 1519, 1520, and 1524 of 1982

ORDER

AND NOW this 15th day of August, 1983, at 10 o'clock A.M., more than seventy-five (75) days having elapsed since the jury, sequestered in the above matter, was selected and sworn and more than fifty (50) days having elapsed since said jury returned its verdicts in both the trial and sentencing proceeding, the Court is now satisfied that the privacy and security of said jurors designed to be protected and promoted by the Order of June 3, 1983, has been satisfactorily accomplished and, accordingly, that provision of the Order of June 3, 1983, providing that:

> "2. No person shall print or announce in any way the names or addresses of any juror."

is hereby vacated effective this date.

BY THE COURT,

Patrick J. Toole Jr., J.

cc: District Attorney
Basil Russin, Esq.
Joseph Sklarosky, Esq.
Al Flora, Esq.

IN THE
SUPREME COURT OF PENNSYLVANIA

CAPITAL CITIES MEDIA, INC., t/d/b/a THE WILKES-BARRE TIMES LEADER and NEP COMMUNICATIONS, INC., t/d/b/a WNEP-TV NEW, Applicants	:	No. 101 E.D. Misc. Dkt. 1983
v.	:	
PATRICK J. TOOLE, JR., JUDGE OF THE COURT OF COMMON PLEAS OF LUZERNE COUNTY	:	Original Process

ORDER

PER CURIAM Filed: June 30, 1983

Application for Writ of Prohibition denied.

The Times Leader Friday, June 3, 1983.

Trial blunder causes hardship for everyone

Don't think the Luzerne County Court has become a laughingstock over the foulup in the Romanchick murder case. There is nothing funny when responsible officials can't keep evidence sorted out.

Extensive preparation and seven days of court proceedings went down the drain Wednesday when Judge Bernard Podcasy ruled a mistrial after determining that jurors were provided with photographs that he deemed were prejudicial. Those photographs linked the defendant, 29-year-old Tyrone Moore of Philadelphia, to an Oct. 2 bank robbery. Earlier, the judge had ruled them to be inadmissible evidence. If somebody had been efficient, those photographs would have been filed away someplace.

At this trial, Moore was being charged with criminal homicide, robbery, conspiracy, theft and reckless endangerment in connection with the Oct. 1 holdup of the Forty Fort Animal Hospital. At that time, 31-year-old Nicholas Romanchick of Plymouth Township, a customer at the clinic, was fatally shot.

Attorneys blamed the mix-up on court stenographer Carl Augustine, who reportedly had custody of the photographs. Mr. Augustine promptly denied the accusation, saying, "It wasn't my fault," while refusing to elaborate on whose fault it was.

We don't know whose fault it was. But it sure was somebody's. A living, breathing — although apparently unthinking — person with access to the photographs plainly messed things up. And that person deserves to be identified and appropriately disciplined. Furthermore, the entire system had better be fine-tuned to make sure a snafu like this doesn't happen again.

Perhaps the only saving grace is that the error was discovered before a verdict was reached, possibly avoid-

ing justification for an appeal several years from now. It would be an outrage if such an error were to cause a conviction to be overturned.

It's no wonder the public is in an uproar over crime in America, when so many cases result in bizarre developments like this one.

A staffer of the frustrated District Attorney's office said the prosecution would continue to seek a first-degree murder conviction in the case, which must be retried within 120 days. Meanwhile, a man's guilt or innocence remains undetermined, the victim's family will endure the prolonged agony of waiting, and a pile of tax money has been wasted.

Ray Blockus

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the within Brief in Opposition was served on the following by mailing same, first class and postage prepaid, as follows:

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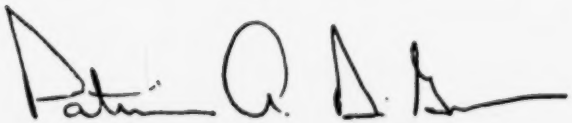

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